No. 81-6777

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

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SUPREME COURT, U.S.

GARNETT WILLIAM CAPE,

Petitioner,

v.

WALTER D. ZANT, WARDEN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF BUTTS COUNTY, GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTIONS PRESENTED

1.

Whether the state habeas corpus court properly determined that Petitioner received effective assistance of counsel.

2.

Whether the instruction given to the jury in the sentencing phase provided complete and proper guidance for the consideration of the death penalty in the instant case.

3.

Whether the Supreme Court of Georgia properly determined that the imposition of the death penalty in the instant case did not result in an overbroad construction of the seventh statutory aggravating circumstance.

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PART ONE

STATEMENT OF THE CASE

Petitioner, Garnett William Cape, was indicted in Franklin County, Georgia during the October Term, 1979 for the murder of Karen Dove. (R. 4, 5). Following a trial by jury, Petitioner was found guilty of murder and the jury imposed the death penalty based on a finding of the seventh statutory aggravating circumstance. Ga. Code Ann. § 27-2534.1(b)(7).

The evidence at trial revealed that the Petitioner, a fifty-six year old male, was the uncle of the victim's mother. He was also well-acquainted with the victim's family and had developed a close relationship with all members of the family, including the victim, a fifteen year old high school student.

The parents of the victim had previously requested the Petitioner not to come around their daughter any longer. The victim's mother testified that the Petitioner had seemed too interested in the victim and was acting more like a boyfriend toward her. Approximately two weeks prior to the murder, Petitioner was talking to the victim's brother about buying a car for her.

On May 12, 1979, Petitioner went to a car dealership and indicated that he wanted to buy a car for his niece. He signed an order for a car costing over $8,000. The next day the Petitioner took the victim to the dealership to see the car. On Monday he informed the dealership that his money was being wired from a bank in Texas and that he would pick up the car on Thursday.

On May 17, 1979, Petitioner took the victim and a friend to school. Petitioner picked up the victim from school at 3:15 p.m. that afternoon. At 4:45 p.m. Petitioner went to a hardware store and told the victim's brother that he had taken Karen to get her birth certificate at the courthouse, but that she had never come out of the courthouse. Ronald Dove, the victim's brother, noticed that the Petitioner had scratches on his hands and face at that time.

Around 6:30 p.m., the victim's brother and two friends went to the Petitioner's house. There was a note on the door indicating that the Petitioner had gone to Anderson, Georgia.. The three people unlocked the front door through a broken window pane after finding that a chair had been propped up against the front door from the inside. There were clothes scattered around the first bedroom in the house and a string of clothes was hanging across another door in the second bedroom. They found the body of Karen

Dove lying on a piece of black plastic on the floor in the second bedroom with the plastic covering half of the body of the victim.

An autoposy revealed that there were multiple stab wounds to the head of the victim, including numerous lacerations on the scalp, a wound in front of the left ear, contusions over both eyes, ears and sides of the head, multiple fractures to the skull and bruising on the tongue and lips. There were also five major stab wounds in the left side of the back and two stab wounds in the front chest. There was also an abrasion on the elbow and a contusion on the left shoulder. The cause of death was most directly related to the lost of blood. An iron pipe found in the house fit some of the wounds and could have caused the blows to the head. The evidence showed that the injuries to the face and head occurred prior to the stab wounds and that the victim was probably alive at the time the wounds were inflicted.

Tests conducted by the State Crime Lab indicated that there was a weak suggestion of the presence of seminal fluid on the oral swabs taken from the victim. Hair was found on the end of the iron pipe which was similar to that of the victim.

The Petitioner testified at trial and asserted again that the victim disappeared from the courthouse. Various witnesses testified concerning the Petitioner's character during the guilt-innocence phase of the trial and the punishment phase.

After the conviction and sentence were imposed, the Petitioner filed a motion for a new trial which was denied. A direct appeal was filed pursuant to Georgia law in the Supreme Court of Georgia. The Supreme Court of Georgia affirmed the

conviction and sentence on October 8, 1980. Cape v. State, 246 Ga. 520, 272 S.E.2d 487 (1980). This Court denied the petition for a writ of certiorari on January 26, 1981.

Petitioner subsequently filed a petition for a writ of habeas corpus in the Superior Court of Butts County, Georgia. The Court allowed tape recorded depositions to be taken in order to present evidence on that petition. Some ten depositions were taken and presented to the Court as well as approximately eight affidavits. A hearing was held on the petition on May 19, 1981, at which time Petitioner presented the testimony of three witnesses in his behalf. The testimony of Petitioner's trial attorney, Mr. Floyd W. Keeble was presented by the Respondent. On October 28, 1981, the Superior Court of Butts County denied habeas corpus relief. A subsequent application for a certificate of probable cause to appeal was denied on February 24, 1982 by the Supreme Court of Georgia.

Petitioner is now seeking to have this Court review the decision by the state habeas corpus court in this regard.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. THE STATE HABEAS CORPUS COURT PROPERLY DETERMINED THAT PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL.

Petitioner has made two allegations concerning competency of counsel before this Court. Petitioner initially asserts that this Court should review this decision to ascertain what standard should be applied in determining the effectiveness of trial counsel in death penalty cases. Petitioner then seeks to have this Court review the effectiveness of his trial counsel.

Although several slightly differing standards have been set forth concerning the effectiveness of trial counsel, the standard applied by the state habeas corpus court is the same standard as applied by the courts in the State of Georgia and by the federal courts of this circuit. See Mackenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960), cert. denied, 368 U.S. 877 (1961); Pitts v. Glass, 231 Ga. 638, 203 S.E.2d 515 (1974). Thus, the standard applied by the state habeas corpus court should be determined to be the correct standard in the instant case, that is, counsel reasonably likely to render and rendering reasonably effective assistance, but not counsel judged by hindsight.

Petitioner places primary emphasis on the alleged failure of counsel to develop and present evidence in mitigation at the sentencing phase of the trial, attempting to make a comparison to the decisions of this Court in Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, ___U.S.___,

102 S.Ct. 869 (1982). The decisions in those cases rested on the fact that a jury or a sentencer was prohibited, either by law or by the court, from considering evidence in mitigation which was relevant. No such prohibition existed in the instant case. Rather, Petitioner attempts to compare the actions of counsel with the prohibitions imposed by the court or by statute in the decisions in Lockett and Eddings.

In reviewing the question of the effectiveness of trial counsel, it is necessary to examine the actions of counsel in the context of the trial as a whole. Mr. Keeble thoroughly prepared for the trial of Petitioner's case. He had an investigator working with him who interviewed all of the witnesses, except for a few witnesses from the State Crime Lab, who were not interviewed until the day of trial. Mr. Keeble had access to the State's file and filed a general motion for discovery and a motion for the appointment of expert witnesses. A motion was filed challenging the constitutionality of the death penalty and a motion was filed for a change of venue. Mr. Keeble and his investigator sought affidavits to support his motion for a change of venue, but determined that there was not that much discussion in the community about the crime. Mr. Keeble also filed a motion for individually sequestered voir dire and a motion for an independent psychiatric examination of the Petitioner.

Mr. Keeble indicated that Mr. Strickland assisted in the trial of the case, interviewed witnesses and participated in the voir dire. Mr. Keeble had a friend who was a pathologist who assisted him in reviewing the terminology from the scientific report and the autoposy report. A specific request to charge on good character was submitted. Several family members were presented at trial to testify as to Petitioner's good character.

In considering the allegation of effectiveness of counsel, the state habeas corpus court found as follows:

> "In the sentencing phase, Counsel presented evidence of Petitioner's good character in mitigation. In preparation for this phase, Counsel talked at length with Petitioner's son and sister about Petitioner's background. (H.T. 105-106). Counsel also consulted with other family members prior to trial. (H.T. 75). Counsel had asked Petitioner for a list of witnesses and called all of those witnesses except two or three who did not want to testify."

(Habeas corpus order at 4). The court then went on to apply the standard previously set forth and found, "Mr. Keeble was experienced in the trial of criminal cases. He prepared for and advocated Petitioner's cause in a reasonably effective manner. The effort he put forth was certainly reasonably effective within the meaning of the standard." (Habeas corpus order at 5). Finally, as noted by the court, the allegations concerning the preparation of witnesses, "constitute the kind of hindsight which has never provided the basis for ineffective assistance claims. . . . Disagreements about trial strategy and tactics do not require a finding of ineffectiveness." (Habeas corpus order at 6).

Respondent asserts that in considering the performance of Mr. Keeble as a whole, it is clear that Mr. Keeble rendered

more than reasonably effective assistance, and in fact acted as a diligent and conscientious advocate for the Petitioner. Although at this stage, there may be things that an attorney could find that Mr. Keeble could have done, no court has ever required a standard of hindsight in considering allegations of ineffective assistance of counsel. Even in considering the performance of counsel on death penalty cases, there is no logical reason for applying a standard in which hindsight may be used to test the performance of counsel. An individual must rely on the knowledge and decisions of his trial counsel in determining the appropriate tactics and strategy to apply at trial. The mere fact that one attorney may have called more witnesses, prepared a witness differently or made different objections, does not suffice to render trial counsel's performance ineffective.

Respondent asserts that as the state habeas corpus court properly applied the correct standards in determining this issue, there are no constitutional issues presented for review by this court on a petition for a writ of certiorari.

B. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY DURING THE SENTENCING PHASE OF THE TRIAL CONCERNING THE IMPOSITION OF THE DEATH PENALTY.

Petitioner challenges the manner in which the jury was instructed at trial concerning the use of the seventh statutory aggravating circumstance. Petitioner asserts that none of the terms specified in the statute were defined, that no findings of fact were made by the jury and that the mitigating instructions were not elaborated. Petitioner also complains that there is no evidence to show that the jury made the same findings as made by the Supreme Court of Georgia on direct appeal concerning the presence of serious sexual abuse and serious physical abuse.

On direct appeal the Supreme Court of Georgia conducted its sentence review as required under Ga. Code Ann. § 27-2537(c). In conducting this review, the Court specifically considered the instruction to the jury in the sentencing phase of the trial. The Court found that a limiting charge was not required as to the aggravating circumstance used, that is, Ga. Code Ann. § 27-2534.1 (b)(7). The Court stated, "while the trial court did not give a limiting charge on § 27-2534.1(b)(7), we hold that a limiting charge was not required under the facts of this case." Cape v. State, 246 Ga. at 527, citing Godfrey v. Georgia, 446 U.S. 420 (1980) and Hance v. State, 245 Ga. 856, 268 S.E.2d 339 (1980). As previously noted by this Court in Godfrey, the validity of the death sentence rests on whether the Supreme Court of Georgia can be found to have applied a constitutional construction of the seventh statutory aggravating circumstance in light of the facts and circumstances of the murder. In Godfrey, supra, no torture, aggravated battery or depravity of mind was found by the jury.

Thus, the jury merely found the first portion of the aggravating circumstance requiring the court to indulge in much speculation as to the jury's findings. "However, in the case at bar, the jury's finding of the second clause of the statute is supported by the evidence beyond a reasonable doubt, and speculation as to the jury's interpretation of the statute by the reviewing court is not required, thereby allowing rational review of the death sentence." Cape v. State, 246 Ga. at 528.

Thus, it is clear that there was no need for a further definition of the terms set forth in this seventh aggravating circumstance. The Supreme Court of Georgia has noted on prior occasions that the words in the statute are words of common meaning and understanding and do not require a specific definition. It might be argued, if aggravated battery were the issue, that the statutory definition should be presented. In the instant case the key words in the statute are torture and depravity of mind. These words are easily understood by ordinary people and do not require specific definitions.

In regard to the Petitioner's allegation on the fact finding by the jury, the state habeas corpus court noted that it was unaware of any requirement of a specific finding of fact by the jury other than to find the existence of the statutory aggravating circumstance beyond a reasonable doubt. Petitioner has cited to no such requirement either in State law or any constitutional requirement that this be made. Clearly, the jury's finding is a factual finding of the seventh statutory aggravating circumstance. No additional findings were required under the Georgia death penalty scheme.

The charge on mitigation was considered by the Supreme Court of Georgia on direct appeal. The Court noted that the instructions

to jury adequately instructed them as to the definition of mitigating circumstances. Mitigation is generally a word of common meaning and usage and it is not required that a specific definition be given. The Court further noted that under Georgia law, there is no requirement that specific mitigating circumstances be singled out by the Court, nor is there a right to have written instructions to the jury on these mitigating circumstances. Cape v. State, 246 Ga. at 526. Thus, Respondent submits that the Georgia courts followed the law in this State in instructing the jury on the presence of mitigating circumstances. The jury was instructed to consider all facts in mitigation and was provided with sufficient instructions to be able to evaluate any mitigating evidence presented in the case.

Respondent asserts that the findings by the Supreme Court of Georgia and the state habeas corpus court are proper under the prevailing law of the State of Georgia and prevailing federal constitutional principles. Thus, this Court should decline to grant review on this issue.

C. GA. CODE ANN. § 27-2534.1(b)(7) WAS PROPERLY FOUND BY THE JURY IN THE INSTANT CASE.

Petitioner asserts that the Supreme Court of Georgia has failed to properly narrow the imposition of the seventh statutory aggravating circumstance. Petitioner specifically asserts that there was no evidence of prolonged physical abuse in this case and that the victim may even have been unconscious when certain blows were rendered. Petitioner also cities certain other cases in the Supreme Court of Georgia trying to establish the allegation that the Supreme Court has applied this aggravating circumstance toobroadly.

It should first be noted, that the consideration in this case is not the application of this aggravating circumstance in all other cases, but the application to the facts and circumstances of this particular case. The use of this aggravating circumstance in other cases could at the most indicate a general tendency on the part of the court, not establish that it was applied in too broad of a manner in the instant case. Furthermore, without a thorough consideration of the records in each case cited by the Petitioner, it would be imprudent to consider whether the court had made any type of overboard application of the seventh aggravating circumstance in those cases.

What is essential in the instant case is to consider the application of the seventh aggravating circumstance under the facts as presented to the jury. The jury found, "the murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind and/or aggravated battery to the victim." The Georgia Supreme Court made the following findings in this regard:

"Under the evidence in this case, the victim was beaten with an iron pipe. She sustained multiple skull fractures and the force of the attack was so great that the skull was fractured almost in half. The victim sustained bruises on the left shoulder and neck probably as a result of being choked. The tongue and upper lip were bruised and part of the lower lip was swollen. After the victim sustained the head injuries, she was stabbed five times in the back and twice in the chest. Death ensued from the lost of blood.

When the body was found, it was in a partial state of undress. One breast was exposed and the pants the victim was wearing were unzipped. Forensic evidence suggested the presence of seminal fluid in the oral cavity, but was not conclusive. However, the state of undress, bruising about the mouth, and the suggested presence of seminal fluid would authorize a finding of serious sexual abuse. The victim was a 15-year-old female child.

By any rational standard the murder was outrageously or wantonly vile, horrible or inhuman. In that respect

> this murder is distinguishable from ordinary murders in which the death penalty is not appropriate. (cites omitted). The victim did not die instantaneously, and while she was distantly related to the Appellant, this is not a domestic murder. Nor did the victim give Appellant any reason to assault her, and she was not subjecting the Appellant to any emotional trauma. The Appellant made an elaborate attempt to hide the crime."

Cape v. State, 246 Ga. at 528.

The Court went on to cite its prior decision of Hance v. State, 245 Ga. 856, 268 S.E.2d 339, cert. denied. 449 U.S. 1067 (1980), in which it set forth standards to be met in order to constitutionally apply the seventh aggravating circumstance. The Court specifically noted that torture as used in the statute occurred when the victim was subjected to serious physical abuse before death and that serious sexual abuse could constitute the serious physical abuse. In this case, the Court found that the evidence supported a finding of serious sexual abuse and serious physical abuse. "A defendant who tortures the victim or subjects the victim to an aggravated battery before killing the victim can be found to have a depraved mind. The age and physical characteristicsof the victim may be considered in determining depravity of mind." Cape v. State, 246 Ga. at 529.

Petitioner apparently would urge this Court to set down a requirement that torture cannot be found without some sort of lengthy physical suffering like that incurred in McCorquodale v. State, 233 Ga. 369, 211 S.E.2d 577 (1974). The term "torture" has been defined as "any severe physical or mental pain; agony; anguish; the inflicting of severe pain to force information or confession, get revenge, etc." Webster's New World Dictionary 1502 (2nd Edition 1974). Thus, contrary to Petitioner's assertion, there need be no showing of "prolonged physical abuse" in order to support a finding of torture. Torture can occur with the infliction of severe pain in a matter of seconds. Petitioner's argument would require this Court to set down a time table establishing that a certain number of hours or minutes would not constitute torture but past that guideline, torture could be found. The finding by a jury of the seventh aggravating circumstance should be supported when there is sufficient evidence to support a finding of serious physical or sexual abuse, which obviously would result in severe pain to the victim. Thus, the finding of torture is supported in the instant case.

Furthermore, as found by the Supreme Court of Georgia, there is evidence to show depravity of mind in this case. The number of wounds inflicted to the victim is an indication of depravity of mind. That fact coupled with the relationship between the Petitioner and the victim, coupled with the age of the victim and the Petitioner and the condition of the body itself, all support a finding of depravity of mind on the part of the Petitioner.

Thus, Respondent submits that in the instant case the finding of the seventh aggravating circumstance was completely supported by the evidence. This case is not a "typical" murder

case, but involves many additional factors taking it out of that category, thus justifying the imposition of the death penalty in this case.

CONCLUSION

For the above and foregoing reasons, Respondent respectfully requests that this Court deny the petition for a writ of certiorari filed on behalf of the Petitioner, Garnett William Cape.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Mary Beth Westmoreland, a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this brief in opposition for the Respondent upon the Petitioner by depositing a copy of same in the United States Mail with proper address and adequate postage to:

Mr. Stephen B. Bright
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This 23rd day of June, 1982.

Mary Beth Westmoreland
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